Chong Ngai Leong v Grey Worldwide Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1121 OF 2010

ZAINUN ALI, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA

6 AUGUST 2013

Civil Procedure — Judicial review — Certiorari — Industrial Court award — Appeal against — High Court substituted its own findings and views on facts and evidence — Whether findings of fact amenable to judicial review — Whether High Court exceeded its supervisory jurisdiction — Whether warranted appellate court's intervention

The appellant appealed against the decision of the High Court issuing an order of certiorari to quash the award of the Industrial Court. In this case, the appellant commenced employment with the respondent in 1999 as a senior accounts manager. During the tenure of his employment he held various positions and was transferred between a few of the companies within the Grey Worldwide Group. The respondent terminated the appellant's services in May 2003 due to his overall performance which did not meet the respondent's expectations based on a series of appraisals done prior to the above date. The Industrial Court held that the respondent had failed to prove, on a balance of probabilities, the appellant's poor performance. Consequently, the appellant was awarded backwages and compensation in lieu of reinstatement. The High Court, on the other hand, found that the Industrial Court had failed to properly consider the relevant evidence adduced by the respondent in support of its decision to terminate the appellant on the ground of poor performance. The learned judge went on to hold that by omitting to take into account relevant considerations, the Industrial Court had committed an error of law which warranted the court's interference and accordingly, allowed the respondent's application for an order of certiorari to quash the award. It was contended before this court that the trial judge had interfered with the findings of the Industrial Court both as to the facts and the weight to be attached to the evidence in particular that of COW1, COW2 and Lawrence Chan. By doing so, the High Court had acted as an appellate court and had thereby exceeded its supervisory jurisdiction. Similarly it was the appellant's submission that the learned chairman had weighed carefully the evidence of COW1 and COW2 before concluding that the evidence of both these witnesses was insufficient to prove the appellant's poor performance. Hence, it was submitted on behalf of the appellant that the High Court, as a reviewing court, was precluded from substituting its own findings and views on the facts and evidence unless there

had been an error of law on the part of the Industrial Court, which could not be said to be the case here.

Held, allowing the appeal with costs:

(1) It is trite that in an application for judicial review, the High Court was not sitting in its appellate jurisdiction but in its supervisory jurisdiction. It was made clear in *Chan Kwai Chun v Lembaga Kelayakan* [2002] 5 MLJ 273 that in the case of a review, the court may not form its own preferred view of the evidence. In this case, whilst the learned judge appeared to be mindful of the role and responsibility of a reviewing judge, she nevertheless fell into error when she set about examining the evidence and forming her own preferred view as to the evidence of COW1, COW2 and Lawrence Chan as reflected in her findings of this judgment (see paras 20 & 25–26).

(2) As to the evidence of COW1 and COW2, there was no basis for the learned judge to substitute her own view with regard to the evidential value to be attached to these witnesses' evidence. The Industrial Court having heard the evidence of COW1 and COW2 was in the best position to determine whether their evidence was sufficient to support the respondent's case. For the above reasons, the learned judge had misdirected herself and acted in excess of her jurisdiction when she interfered with the findings of the Industrial Court, in particular with the evidence of COW1, COW2 and COW3 by forming her 'own preferred view of the evidence' (see paras 28–29).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan Mahkamah Tinggi dalam mengeluarkan perintah certiorari bagi membatalkan award Mahkamah Perusahaan. Dalam kes ini, perayu memulakan perkhidmatan dengan responden pada tahun 1999 sebagai pengurus kanan perakaunan. Semasa tempoh perkhidmatannnya, dia memegang pelbagai jawatan dan dipindahkan ke beberapa syarikat dalam Grey Worldwide Group. Responden menamatkan perkhidmatan perayu pada Mei 2003 akibat prestasinya secara keseluruhan yang tidak mencapai jangkaan responden berdasarkan satu siri penilaian yang dibuat sebelum tarikh tersebut. Mahkamah Perusahaan memutuskan bahawa responden gagal membuktikan, atas imbangan kebarangkalian, akan prestasi lemah perayu. Dengan itu, perayu diawardkan dengan gaji tertunggak dan pampasan sebagai ganti pelantikan semula. Mahkamah Tinggi, walau bagaimanapun, mendapati bahawa Mahkamah Perusahaan gagal mempertimbangkan dengan betul keterangan relevan yang dikemukakan oleh responden sebagai menyokong keputusannya untuk memecat perayu atas alasan prestasi yang lemah. Hakim seterusnya memutuskan bahawa dengan ketinggalan untuk mengambil kira pertimbangan-pertimbangan yang relevan, Mahkamah Perusahaan telah melakukan kekhilafan undang-undang yang mewajarkan campur tangan

mahkamah dan sewajarnya, membenarkan permohonan responden bagi perintah certiorari untuk membatalkan award. Dihujahkan di mahkamah ini bahawa hakim bicara telah campur tangan dalam dapatan Mahkamah Perusahaan iaitu dalam fakta dan pertimbangan yang patut diberikan kepada keterangan khasnya COW1, COW2 dan Lawrence Chan. Dengan berbuat sedemikian, Mahkamah Tinggi telah bertindak sebagai mahkamah rayuan dan dengan itu telah melampaui bidang kuasa pengawasannya. Begitu juga, adalah menjadi hujahan perayu bahawa Pengerusi telah mempertimbangkan keterangan COW1 dan COW2 sewajarnya sebelum memutuskan bahawa keterangan kedua-dua saksi adalah tidak mencukupi untuk membuktikan prestasi lemah perayu. Oleh itu, dihujahkan bagi pihak perayu bahawa Mahkamah Tinggi, sebagai mahkamah semakan, dihalang daripada menggantikan dapatan dan pandangannya sendiri terhadap fakta dan keterangan melainkan terdapat kekhilafan undang-undang di pihak Mahkamah Perusahaan, yang mana tidak boleh dikatakan berlaku dalam kes ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah undang-undang matan bahawa dalam satu permohonan semakan kehakiman, Mahkamah Tinggi tidak berada dalam bidang kuasa rayuannya tetapi adalah dalam bidang kuasa semakannya. Adalah diterangkan dengan jelas dalam kes *Chan Kwai Chun v Lembaga Kelayakan* [2002] 5 MLJ 273 bahawa dalam kes semakan, mahkamah tidak boleh membentuk pandangannya sendiri ke atas undang-undang. Dalam kes ini, sementara hakim kelihatan prihatin dengan peranan dan tanggungjawabnya sebagai hakim semakan, beliau walau bagaimanapun terkhilaf dalam memeriksa keterangan dan membentuk pandangannya ke atas keterangan COW1, COW2 dan Lawrence Chan seperti yang tergambar dalam dapatan penghakimannya (lihat perenggan 20 & 25–26).

(2) Berkenaan keterangan COW1 dan COW2, tidak terdapat asas bagi hakim untuk menggantikan pandangannya ke atas nilai keterangan yang perlu diletakkan pada keterangan-keterangan saksi-saksi ini. Mahkamah Perusahaan setelah membicarakan keterangan COW1 dan COW2, berada dalam kedudukan terbaik untuk menentukan sama ada keterangan adalah mencukupi untuk menyokong kes responden. Bagi sebab-sebab di atas, hakim telah tersalah arah dirinya dan bertindak melampau bidang kuasanya apabila beliau campur tangan dalam dapatan Mahkamah Perusahaan, khasnya berkenaan keterangan COW1, COW2 dan COW3 dengan membentuk pandangannya sendiri terhadap keterangan (lihat perenggan 28–29).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5116–5117.

Cases referred to

Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors [2010] 3 MLJ 753, CA (refd)

Chan Kwai Chun v Lembaga Kelayakan [2002] 5 MLJ 273; [2002] 2 CLJ 288, HC (consd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

In Re Amin [1983] 2 AC 818, HL (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Appeal from: Application for Judicial Review No R1–25–59 of 2008 (High Court, Kuala Lumpur)

Jerry Ling (Lee, Ling & Partners) for the appellant.
HC Yong (Zaid Ibrahim & Co) for the respondent.

Alizatul Khair JCA:

[1] This is an appeal against the decision of the learned High Court judge who had issued an order of certiorari to quash the award of the Industrial Court dated 21 October 2008 ('the award') pursuant to an application for judicial review brought by the respondent (the applicant in the court below) against the appellant (the first respondent in the court below) and the Industrial Court (the second respondent in the court below).

BACKGROUND FACTS

[2] The background facts have been well documented by both the Industrial Court and the High Court. They are briefly as follows.

[3] The appellant commenced employment with the respondent on 2 February 1999 as a senior accounts manager. During the tenure of his employment he held various positions and was transferred between a few of the companies within the Grey Worldwide Group. The appellant was also given promotions, salary increments and bonuses. On 1 June 2000 he was promoted to accounts director. Vide letter dated 4 October 2001 the appellant was transferred to G2 Sdn Bhd ('G2') and his salary increased from RM9,500 to RM12,500 per month. Subsequently by letter dated 3 September 2002, the appellant was transferred to New Business Group in G2. The appellant was informed that an appraisal to benchmark performance on his new role would be held at the end of that year. His performance appraisal prior to his transfer was rated as good.

[4] On January 2003 a performance appraisal was carried out by one Chris Leong (the respondent's president/CEO) and Lawrence Chan, the appellant's superior from January 2003. COW1, the director, Resources Division was the moderator during the appraisal. Following the appraisal the appellant was issued with a letter dated 23 January 2003 which noted that due to the average score marked and issues raised, a follow-up appraisal would be conducted in April 2003.

[5] The appraisal in April 2003 was conducted by Lawrence Chan with COW1 as the moderator. The appellant's performance was rated between average to poor and assessed as lacking seriously in many key areas. The appellant who was present during the appraisal refused to sign the appraisal form after the appraisal was conducted.

[6] Following the appraisal, a letter dated 17 April 2003 was issued to the appellant whereby he was informed that he needed to improve significantly and that if his overall performance did not meet the respondent's expectations, his services would be terminated. The appellant was given until 15 May 2003 to turn around some projects for Mitsubishi or put in a new business pitch. For this work the appellant could get guidance from Lawrence Chan. An email was sent by the latter to the appellant on 17 April 2003 stating what the appellant was required to do as part of his performance benchmarking.

[7] According to COW1 despite the letter and the email the respondent saw no improvement in the appellant's performance. Thus based on the warning letter issued on 17 April 2003, the respondent terminated the appellant's services on 30 May 2003.

DECISION OF THE INDUSTRIAL COURT

[8] The Industrial Court chairman found, after evaluating the evidence before her, that the respondent had failed to prove on a balance of probabilities the appellant's poor performance. Consequently she found that there was no cause or reason to justify the appellant's dismissal and the appellant's dismissal was therefore without lawful excuse. The appellant was awarded backwages and compensation in lieu of reinstatement, the latter because the Industrial Court found that in the circumstances of the case reinstatement was not an appropriate remedy.

DECISION OF THE HIGH COURT

[9] The learned High Court judge on the other hand found that the Industrial Court had failed to properly consider the relevant evidence adduced by the respondent in support of its decision to terminate the appellant on the

ground of poor performance. The learned judge went on to hold that by omitting to take into account relevant considerations the Industrial Court had committed an error of law which warranted the court's interference and she therefore allowed the respondent application for an order of certiorari to quash the award.

THE APPEAL

[10] The thrust of the appellant's argument before us was that the learned High Court judge misdirected herself when she held that 'the Industrial Court has failed to properly consider the relevant evidence adduced by the Applicant in support of its decision to terminate the 1st Respondent on the ground of poor performance …' (see p 45 RR *Bahagian* A).

[11] Learned counsel pointed out that the learned judge in arriving at her decision made the following findings.

[12] Firstly, that the Industrial Court had failed to take into account that the basis for the appellant's termination is not grounded solely on the appraisal by Lawrence Chan but was based on a series of appraisals done before 14 April 2003.

[13] Secondly, the Industrial Court made a 'perverse' finding when it held that COW1's evidence was not sufficient to prove the appellant's poor performance because COW1's evidence was based on what others told her.

[14] Thirdly, the Industrial Court was wrong in not according due consideration to the evidence of COW2 as COW2 was one of the appraisers for the appraisal conducted on 11 December 2002 together with Chris Leong and Lawrence Chan. It was the learned judge's opinion that although COW2 was the appellant's immediate superior for only three month, he would have sufficient knowledge to appraise the appellant's performance, (see pp 44–45, RR *Bahagian* A).

[15] These findings in the appellant's view amounted to an interference with the findings of the Industrial Court both as to the facts and the weight to be attached to the evidence in particular that of COW1, COW2 and Lawrence Chan. By doing so the High Court had acted as an appellate court and had thereby exceeded its supervisory jurisdiction.

[16] Learned counsel for the appellant submitted that it is clear from the award that the Industrial Court had taken into account and given due consideration to all relevant evidence adduced by the respondent before

deciding that based on the totality of the evidence Lawrence Chan's testimony was crucial to the respondent's case. This was what the learned chairman held:

> After considering the evidence in totality … the court is of the opinion that it is essential for the company to call Lawrence Chan as a witness to prove the claimant's poor performance. The two appraisal reports relied by the company do not suffice as proof of the claimant's performance. Though the appraisals were within the claimant's personal knowledge and he was present during the appraisals, claimant had testified that he did not agree with the ratings given and, for the second appraisal he refused to sign … That being so, it is obvious that the evaluation by the appraiser ie Lawrence Chan is disputed. This necessitated putting Lawrence Chan on the witness stand and be examined on the basis of the ratings and the comments he made as regard to the claimant's job performance. Only when Lawrence Chan was able to satisfactorily substantiated (sic) the appraisal he had made, then it can be said that there was convincing and compelling evidences (sic) that the claimant had performed poorly which merited termination of his service (see p 260 RR *Bhg* C, *Jld* 2)

[17] Similarly it was counsel's submission that the learned chairman had weighed carefully the evidence of COW1 and COW2 before concluding that the evidence of both these witnesses was insufficient to prove the appellant's poor performance.

[18] Hence it was counsel's submission that the High Court as a reviewing court was precluded from substituting its own findings and views on the facts and evidence unless there had been an error of law on the part of the Industrial Court, which could not be said to be the case here.

OUR DECISION

[19] After carefully considering the submissions of both counsel for the appellant and the respondent, we agree with the appellant that in coming to her decision the learned judge had not exercised her powers of review in accordance with established principles and we therefore allowed the appeal with costs. Our reasons are as follows.

[20] It is trite that in an application for judicial review, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction, (see *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, and *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417). As observed by Lord Fraser of Tullybelton in *In re Amin* [1983] 2 AC 818 — (cited with approval by the Court of Appeal in *Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors* [2010] 3 MLJ 753:

> … Judicial review is entirely different from an ordinary appeal. It is made effective by the courts quashing an administrative decision without substituting its own decision. And is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative office.

[21] In the present case the crux of both parties' argument centered on the Industrial Court's finding that the evidence of one, Lawrence Chan was crucial to the respondent's case and that failure of the latter to call him to testify before the court resulted in a decision in favour of the appellant.

[22] The High Court, as shown earlier, agreed with the respondent's argument that the Industrial Court had failed to take into account the following relevant evidence in arriving at its decision, ie:

(a) the fact that there were two written appraisals which were produced and marked as exhibits before it (see pp 132–136 and 145–149, RR *Bah* C *Jld*1) and or attach appropriate weight to these appraisals;

(b) the evidence of COW1 who was not just a 'moderator' with no personal knowledge of the events that transpired as found by the Industrial Court but had in fact involved herself in every way in the issues relating to R1's performance. The evidence showed that she attended the appraisals, had personal knowledge of the issues and addressed the issues in direct communications with the appellant. The Industrial Court was wrong in law and in fact to conclude that her evidence was not sufficient and that Lawrence Chan ought to have been called; and

(c) the evidence of COW2 was relevant even though he only testified on the first appraisal carried out in January 2003. According to the respondent it was the first appraisal that triggered off a monitoring process and continuing appraisal of the appellant arising from poor performance. His performance as set out in the first appraisal and duly confirmed by COW2 would therefore be relevant as it constitutes part of a continuing chain of events leading to the appellant's eventual exit from employment due to poor performance.

[23] Learned counsel for the respondent contended that the learned judge had acted well within the province of judicial review when she found that the Industrial Court had failed to properly consider the evidence set out in paras (a)–(c) above in arriving at its finding that the appellant had failed to prove its case.

[24] The learned judge, in the respondent's view, was careful to note that it should disregard any attempt to appeal against any findings of fact and concentrate on issues relating to judicial review. In doing so, the High Court

was correct to hold that the Industrial Court had failed to consider and attach weight as appropriate to relevant evidence in its decision making process.

[25] With respect we are unable to agree with learned counsel for the respondent. In the case of *Chan Kwai Chun v Lembaga Kelayakan* [2002] 5 MLJ 273; [2002] 2 CLJ 288 a case cited by the learned judge in her judgment, Ariffin Zakaria J (now Chief Justice Malaysia) made it emphatically clear that in the case of a review the court may not form its own preferred view of the evidence. As postulated by His Lordship in his judgment which we reproduce below for convenience:

> The principle behind the approach is that judicial review is concerned with the legality and not the merits of a decision; accordingly it is not open to me to examine the evidence with a view to forming my own view about the substantial merits (see *Tesco Stores Ltd v Secretary for the Environment* [1995] 2 All ER 636 at p 657.) In *Reid v Secretary of State for Scotland* [1999] 2 AC 517 at p 541 L Clyde said:
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> > Judicial review involves a challenge to the legal validity of the decision. *It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case.* It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is initiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. (Emphasis added.)

[26] Thus in the present case whilst the learned judge appears to be mindful of the role and responsibility of a reviewing judge she nevertheless fell into error when she set about examining the evidence and forming her own preferred view as to the evidence of COW1, COW2 and Lawrence Chan as reflected in her findings at p 6 of this judgment.

[27] As submitted by learned counsel for the appellant, such findings were in direct contrast to that of the Industrial Court's which had, after careful examination of the evidence concluded that in its opinion Lawrence Chan's testimony was essential in proving the appellant's poor performance, the two

appraisal reports relied on by the respondent not providing sufficient proof (see the Industrial Court's finding set out at p 7).

[28] As to the evidence of COW1 and COW2 we are of the view that there was no basis for the learned judge to substitute her own view with regard to the evidential value to be attached to these witnesses' evidence. The Industrial Court having heard the evidence of COW1 and COW2 was in the best position to determine whether their evidence was sufficient to support the respondent's case. As explained by the learned chairman in her award, which in our opinion merits being quoted in extenso:

> Evidence by the two company's witnesses were not sufficient enough to prove that the claimant were not performing his duties as expected by the company. This is because COW-1 being the Director of the Resources Division would not in all probability have the personal knowledge about the claimant's performance. She had stated that in her role as Director she was to oversee and manage all human resources and administrative matters and issues in the company, and this included components of training, planning and dealing with any manpower or human resources such as appraisal systems and performance management. Further, when the appraisals for the claimant were carried out she was merely a moderator. Thus COW-1's evidence regarding the claimant's performance was not from her personal experience working with the claimant but from what she came to know from others. Hence little weight can be given to her evidence as to whether the claimant was incompetent and/or not performing.
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> As for the evidence given by COW-2, the court is of the opinion that it is not right and fair to rely on his statements to say that the claimant had performed poorly. This is because COW-2 was the claimant's immediate superior from the month of September 2002 until the end of the same year. Thereafter, Lawrence Chan was the claimant's immediate superior until the date of the dismissal. Further, COW2 was not one of the appraisers who appraised the claimant's performance in January 2003. Only his view on the claimant's performance was sought to facilitate the appraisal. Thus COW-2's evidence about claimant's performance was only in respect of the first performance appraisal. Since the company had carried out further performance appraisal in April 2003 whereby COW-2 was not involved at all, the significant of his evidence (which the company depended on to show claimant's poor performance) was further reduced. In this circumstances, the evidence by COW2 cannot fully prove the claimant's poor performance (see pp 261–262, RR *Bah* C *Jld* 2).

[29] For the above reasons we find that the learned judge had misdirected herself and acted in excess of her jurisdiction when she interfered with the findings of the Industrial Court, in particular with the evidence of COW1, COW2 and COW3 by forming her 'own preferred view of the evidence'.

[30] We were therefore constrained in the circumstances to allow the appeal which we did with costs to the appellant.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed